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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,	)	2:16-CR-0046-GMN-PAL
Plaintiff,	)	
v.	)	
PETER SANTILLI,	)	
Defendant.	)	

**MOTION TO SEVER DEFENDANT SANTILLI FROM BEING TRIED WITH CO-  
DEFENDANTS AND LEAVE TO SUPPLEMENT**

Comes now, Defendant, PETER SANTILLI, by and through his attorney, Chris T. Rasmussen, Esq., and hereby moves this Court for an order to sever Santilli from the other co-defendants.<sup>1</sup>

DATED this 22<sup>nd</sup> day of May, 2016

/s/ Chris T. Rasmussen

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<sup>1</sup>Santilli requests leave to Supplement this motion as discovery becomes available and the statements of all of the potential defendants are disclosed.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTS**

Santilli is the host of a radio show called "The Pete Santilli Show", this show has over 1500 episodes. The indictment alleges Santilli was involved in a conspiracy:

Paragraph 43: Santilli was a leader and organizer of the conspiracy who, among other things: recruited Followers using the internet and other facilities in interstate commerce; led an assault on federal officers; threatened federal law enforcement officers; and participated in the extortion of the federal law enforcement officers.

(Indictment, pg. 13, Ins 18-21).

The indictment further alleges that Cliven Bundy was on Santilli's radio show on April 8, 2014. See <https://www.youtube.com/watch?v=-nTspLiE6jg> . This interview took place via telephone and was broadcast from the State of California via the internet. This three hour video contains an interview with Cliven Bundy. Santilli broadcasts that a protest will take place at the Bundy Ranch and that everyone who is lawfully allowed to carry a firearm should come to protest on the private property of Bundy Ranch. This broadcast is essentially the first time Santilli becomes specifically aware of the Bundy situation with the BLM, and generally aware of the plight of western ranchers who use public lands.

On April 9, 2014, Santilli traveled to Bunkerville Nevada to cover the protests that were taking place on Bundy Ranch. The BLM on the 9<sup>th</sup> of April were spotted with heavy earth moving equipment which suggested to the Bundy family that their cattle were being destroyed and buried in the desert. They approached the BLM as they were coming off the land. Santilli broadcast the interaction between protestors and the BLM. During this interaction, the BLM were video recorded using police dogs and tasers to control the protesters. Santilli caught the entire event on his camera. This video went viral on YouTube and was the catalyst that delivered hundreds of demonstrators to Bundy Ranch.

The government has indicted nineteen persons that were located at or near Bundy Ranch on April 12, 2016. The diversity of alleged conduct near or around the wash area where the people gathered to protest BLM's actions is wide. Some of the charged defendants possessed firearms. Santilli never possessed a firearm during his time in

1 Nevada. In fact, he carried an Ipad that was attached to a tripod type device to cover the  
 2 events. At no time did Santilli appear at the wash during the alleged "Stand off". Santilli  
 3 was in the medium of Interstate 15 charging his batteries through his vehicle's power  
 4 supply when the infamous "stand off" took place.

5 As this Court is aware, there are several defendants that are depicted in photos with  
 6 firearms on top of the freeway overpass looking toward the commotion down below. The  
 7 guilt by association with these armed individuals is great and prejudicial to Santilli.

8 Santilli has a wholly different defense in that he recorded the events during his days  
 9 at Bundy Ranch. His broadcasts were his advocacy toward the plight of the ranchers in  
 10 the western states that were losing control over land. These broadcasts are protected  
 11 speech by the First Amendment, but are also being used as direct evidence against  
 12 Santilli.

## 13 14 **II. ARGUMENT**

### 15 **Santilli Should Be Severed From His Co-Defendants**

16 The grounds for the severance of Santilli's trial from that of the other defendants is  
 17 be premised upon Federal Rule of Criminal Procedure 14. Rule 14 provides:

18 Relief from Prejudicial Joinder. If it appears that a defendant  
 19 or the government is prejudiced by a joinder of offenses or of  
 20 defendants in an indictment or information or by such joinder  
 21 for trial together, the Court may order an election or separate  
 trials of counts, grant a severance of defendants or provide  
 whatever other relief justice requires.

22 Severance for prejudicial joinder under Rule 14 is discretionary. *See e.g., United States*  
 23 *v. Lutz*, 621 F.2d 940 (9th Cir. 1980).

24 Rule 14 of the Federal Rules of Criminal Procedure provides that if it appears  
 25 that a defendant is prejudiced by joinder of defendants in an indictment or by joinder for  
 26 trial together, the Court may grant a severance or provide whatever other relief justice  
 27 requires. *See e.g., United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980);  
 28 *United States v. Lutz*, 621 F.2d 940 (9th Cir. 1980); *United States v. Tousant*, 619 F.2d 810

(9th Cir. 1980). A motion for severance is addressed to the trial court's discretion. *United States v. Doe*, 655 F.2d 920, 926 (9th Cir. 1980); *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980). The defendant must demonstrate that a joint trial is "so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." *Doe*, 655 F.2d at 926.

Santilli's trial should be severed from that of his co-defendants for two reasons. First, Santilli will be denied access to the exculpatory testimony of his co-defendants. Second, the jury is likely to find Santilli guilty by association.

**A. Santilli will be denied access to co-defendant exculpatory testimony.**

Santilli's co-defendants may offer exculpatory testimony for Santilli at a separate trial, but will likely assert their Fifth Amendment right to remain silent if the defendants are tried together. Upon filing of an affidavit to this effect, Santilli is entitled to severance of his case from that of his co-defendants. *United States v. Vigil*, 561 F.2d 1316 (9th Cir. 1977); *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). Santilli reserves the right to provide the Court with an affidavit which satisfies the requirements of *Vigil*, and thus supports the granting of a severance.

If the Court grants Santilli's motion to sever, Santilli requests that his trial be continued until after that of the co-defendants. If the co-defendants trial were to proceed after Santilli's, they would likely assert their Fifth Amendment right to remain silent at the first trial. The Ninth Circuit has recently re-emphasized that it may "be[ing] an abuse of discretion for the district court to grant severance expressly to enable a co-defendant witness to offer exculpatory testimony and then to deny the continuance which would have deterred the witness from invoking the fifth amendment." *United States v. Tham*, 948 F.2d 1107 (9th Cir. 1991), *superseded*, 960 F.2d 1391 (9th Cir. 1992); *United States v. Gay*, 567 F.2d 916, 921, n.8 (9th Cir. 1978). Accordingly, Santilli requests that he be tried after the co-defendants.

Even if the co-defendants will not voluntarily testify at his separate trial, Santilli has

1 a constitutional right to call him them as witnesses. If a co-defendant is called as a witness  
 2 and refuses to answer questions based on Fifth Amendment privilege, Santilli can seek to  
 3 compel that testimony by requesting immunity as to statements made in court. At that  
 4 time, Santilli could seek an order requiring the government to grant use immunity to the  
 5 co-defendant's testimony under 18 U.S.C. § 6003(b)(1). Such use of this statute is  
 6 compelled by the Sixth Amendment's guarantee of compulsory process and by the Fifth  
 7 Amendment's due process considerations of fairness. See *United States v. Leonard*, 494  
 8 F.2d 955, 985 n.79 (D.C. Cir. 1974) (concurring and dissenting opinion of J. Bazelon).

9 If statutory immunity is not appropriate, the Court can confer immunity  
 10 independent of the prosecutor's statutory power because Santilli would be "prevented from  
 11 presenting exculpatory evidence which is crucial to [his] case." *Government of the Virgin*  
 12 *Islands v. Smith*, 615 F.2d 964, 969-70 (3d Cir. 1980); see *United States v. Alessio*, 528  
 13 F.2d 1029 (9th Cir. 1976). Santilli's rights to compulsory process and to due process of law  
 14 entitle him to a separate trial if the co-defendant refuses to testify at a joint trial.

15 The crux of the allegations against Santilli is that he recruited people to come to Bundy  
 16 Ranch. Santilli will be calling witnesses/defendants that will testify that Santilli's broadcasts  
 17 were of no relevance to their decision to demonstrate on Bundy Ranch. Furthermore,  
 18 these witness/defendants will testify that Santilli was never a leader or an organizer of any  
 19 protest and that he was using recording equipment and wearing notification that he was  
 20 "Press".

#### 21 **B. The Jury May Find Santilli Guilty by Association.**

22 It is extraordinarily difficult for a jury to follow admonishing instructions and  
 23 to keep separate evidence that is relevant only to co-defendants.

24 A co-defendant in a conspiracy trial occupies an uneasy seat.  
 25 This generally will be evidence of wrongdoing by somebody.  
 26 It is difficult for the individual to make his own case stand on its  
 own merits in the minds of jurors who are ready to believe that  
 birds of a feather flocked together.

27 *Krulewitch v. United States*, 336 U.S. 440, 454 (1949). Santilli's defense is wholly different  
 28 than the that of the other defendants. Santilli is the only person in the media that was

1 indicted. As part of his defense, Santilli intends on calling an expert to testify about “new  
2 media” and the internet. The government has continually attempted to discredit Santilli’s  
3 role in the new media. Obviously, the internet has changed the way people obtain their  
4 news. Santilli is a new breed of journalist that offers an alternative news channel to that  
5 of the standard thirty minute loop of the daily events. His show used to run daily for over  
6 three hours in which he had numerous different guests with a myriad of opinions about a  
7 slew of different topics. Santilli will be presenting almost exclusively First Amendment  
8 defenses to the indictment. Specifically, the defense that his actions were not imminent  
9 as defined by case law.

### 10 **Conclusion**

11 Thus, this Court should sever Santilli from the other defendants in the instant  
12 case and set two separate trials.

13 DATED this 22<sup>nd</sup> day of May, 2016.

14  
15 /s/ Chris T. Rasmussen

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